

SERVED: August 3, 1993

NTSB Order No. EA-3944

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of July, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10964
v.)	
)	
JAMES THOMAS WILLAUER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued in this proceeding on June 20, 1991, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed the Administrator's allegations of violations of sections 91.79(c) and 91.9 of the Federal Aviation Regulations (FAR), 14 CFR Part

¹An excerpt of the hearing transcript containing the initial decision is attached.

91.² The law judge did not affirm the sixty-day suspension of respondent's commercial pilot certificate ordered by the Administrator, because respondent timely filed a report of the incident under the provisions of the Aviation Safety Reporting Program (ASRP).³

The facts underlying the complaint involve respondent's operation of a hot air balloon on June 15, 1988. Respondent is alleged to have flown over an operating rock quarry at an altitude of less than 500 feet during his approach to land in an adjacent alfalfa field. According to the complaining witness, the vice president and manager of the quarry, he observed respondent fly low over 6 to 8 trucks, their drivers, a Caterpillar-type front end loader and its operator, and 20 to 22 workers in the quarry area. When the quarry manager first saw the balloon from his office, the basket appeared to be

²FAR §§ 91.79(c) and 91.9 provided at the time of the incident as follows:

"§ 91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes....

(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³The Administrator, who has filed a reply brief, did not appeal the sanction waiver.

approximately 20 to 25 feet above stockpiles of crushed rock which were themselves 25 feet high. The quarry manager testified that he then jumped into his truck and gave chase. He claims that as he reached the top of the ramp of the quarry hole, he saw the balloon descend below the rim. He then drove down the ramp along the wall of the quarry hole until he was approximately 75 feet below the rim. He claims that by then the basket had descended to his "eye-level." The quarry manager yelled at respondent, demanding that he leave. He admits that he was very angry, because he considered respondent's presence extremely dangerous to his workers, respondent's balloon, and to his passengers.⁴ Eventually, respondent fired up his balloon and ascended from the quarry hole.

A front-end loader operator also testified that he recalled an incident when he observed a balloon fly at an altitude of 60 or 70 feet over the quarry, towards the quarry hole. He was not certain of the day of this particular incident, but he testified that he has seen many balloons fly over the area and this one occasion was noteworthy because the balloon was so low, and because the quarry manager chased the balloon in his truck. The quarry manager subsequently filed a complaint with the Federal Aviation Administration.

⁴Respondent claimed that he knew that there would be no danger of blasting that day, because there had already been blasting a few days before. However, the quarry manager and a front-end loader operator both testified that there really is no set schedule for blasting in that quarry.

According to respondent, he never intended to land in the quarry, which he agrees would have been an inappropriate landing site. His chosen landing site was an alfalfa field on the other side of the quarry. As he approached the alfalfa field, using a step-down method to descend, he was unexpectedly caught by a turning current to the left which turned the balloon back over the quarry area.⁵ He explains that as he went over the quarry hole at an altitude of 100 feet on his approach to land, he merely shut off the burner because there was a lot of noise coming from the conveyers, and he wanted to hear what the quarry manager was saying to him. While in so doing he may have dropped 50 feet or thereabouts, he claims that he never went below the rim of the quarry hole.

The law judge made credibility determinations in favor of both parties. He accepted respondent's claim that he never intended to cross over the quarry, but he found as a matter of fact that respondent did operate the balloon over the quarry below the altitude minimums. The law judge also found that respondent did descend below the rim of the quarry hole, albeit inadvertently, in order to hear what the quarry manager was

⁵Respondent presented an expert balloonist who testified that using a step-down technique was appropriate. According to the expert, a balloonist can react to an unexpected turn because of the wind within 2 or 3 seconds by using his burner as a brake and adjusting the altitude with short burns. A balloonist who served as a member of the chase crew that day testified that she followed the balloon at all times, and only lost sight of it for a few minutes, over the quarry. She claims that respondent's balloon was at an altitude of 200-300 feet before he reached the quarry, and at about 150 feet when she regained sight of it.

saying to him. Finally, the law judge concluded that because operating a hot air balloon at a low level over an operating quarry is inherently dangerous, the alfalfa field adjacent to it was an unsuitable landing site, thereby rejecting respondent's legal argument that even if his flight was below minimums, it could be excused under the prefatory language of FAR section 91.79, which provides an exception to the altitude minimums when low altitude is necessary for takeoff or landing. Because the low flight was inadvertent, the law judge found that the sanction could be waived under the ASRP.

Respondent asserts on appeal that the Administrator failed to produce sufficient reliable evidence to sustain the FAR violations, couching his argument in terms of an attack on the credibility of the quarry manager. We will not overturn credibility determinations of a law judge absent evidence that his findings are arbitrary and capricious or based on inherently incredible evidence. See Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992), and cases cited therein. Respondent fails to offer us a persuasive reason to overturn the factual findings here. In any event, respondent fails to acknowledge in his appeal that he admitted on the stand that he operated the balloon below the requisite altitude minimums while over the quarry area, and, more significantly, when he was over the quarry hole.

In the Board's view, the evidence concerning the events which took place in, above, and around the quarry hole independently supports the findings of violations of the

regulations. Respondent claims he came no closer to the quarry manager than 150 feet; the manager claims it was 50 to 75 feet. Regardless of whose version of the events is accepted, there is no question but that respondent's balloon came impermissibly close, i.e., less than 500 feet, to the quarry manager and his vehicle.

Respondent argues, nonetheless, that he should be excused from this portion of the low flight because the quarry manager brought it upon himself, by chasing and yelling at respondent. We disagree. We are unaware of any Board precedent which stands for the proposition that one may operate below altitude minimums with the express or implied consent of those on the ground.⁶ Once respondent found himself over the quarry hole, he should have immediately taken action to extricate himself from the situation. Instead, he momentarily turned off his burners, causing him to descend too close to those below him.⁷ This action was clearly careless and potentially dangerous to those persons in the quarry hole, as well as to himself, his

⁶In support of his argument respondent cites an initial decision where the law judge excused a landing in a residential subdivision because the property owner had given that respondent permission to land. That decision was reversed by the Board on appeal by the Administrator. Administrator v. Pringle, NTSB Order No. EA-3428 (1991). Respondent's reliance on Administrator v. Zito, NTSB Order No. EA-2955 (1989) is also misplaced. The issue of whether a landing site may be rendered unsuitable because the area adjacent to it is unsuitable was not before the Board in that appeal.

⁷In addition to the quarry manager on the ramp, there were workers in the pit below.

passengers, and his balloon.⁸

Finally, respondent argues that the law judge erred in finding that his low flight should not be excused even though it occurred during an approach to land. We think that the law judge's legal analysis is correct on this point. Board precedent is clear that the prefatory language of 91.79 will not serve to excuse a pilot unless the evidence establishes that the chosen landing site was suitable. Administrator v. Cory, NTSB Order No. EA-2767 at 6 (1988), citing Administrator v. Rees, 4 NTSB 1323 (1984). In Rees we found that the question of suitability of a landing site may include an evaluation in terms of the necessity for landing there, as opposed to another site which would not entail the same risks to persons and property below the landing site. We concur in the law judge's finding here that this alfalfa field was not a suitable landing site because of its proximity to an operating quarry, particularly in light of respondent's own expert witnesses' testimony that his balloon could be blown over the quarry at any given point in time. Respondent offers no reason why he could not have chosen a landing site which would have presented less of a potential for danger to his balloon and to persons and property on the ground.

In any event, even if respondent was accidentally blown over the quarry during the landing procedure, his decision to turn off his burners, which resulted in his descent into the quarry hole, was

⁸According to the evidence, debris from blasting can fly in all directions, up to 75 feet.

not a maneuver which was necessary for his landing, and therefore the prefatory language cannot serve to excuse that portion of his operation below the minimum altitudes set forth in FAR section 91.79(c).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's order, as modified by the law judge's initial decision waiving sanction, and the initial decision, are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.